STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
v	No. 297065 Ingham Circuit Court
MICHAEL RODRIGUEZ-ARANGO, Defendant-Appellant.	LC No. 09-000879-FC

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). The trial court sentenced him to concurrent sentences of 300 to 480 months' imprisonment for each CSC I conviction and 86 to 180 months for the CSC II conviction. Defendant appeals as of right. On May 6, 2011, this Court remanded the case for a *Ginther*[1] hearing.[2] For the reasons set forth in this opinion, we affirm.

Defendant, an openly gay man, was convicted based on evidence that he sexually assaulted the victim when the victim was under 13 years of age.

Defendant first argues that he was denied the effective assistance of counsel for several reasons. Whether defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] *People v Rodriguez-Arango*, unpublished order of the Court of Appeals, entered May 6, 2011 (Docket No. 297065).

668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, a "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003); see also *Strickland*, 466 US at 687-688. Second, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's error. *Strickland*, 466 US at 694; *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant asserts that defense counsel himself was expressly hostile to defendant's sexual orientation, and counsel's personal bias against defendant at trial compromised his willingness and ability to be an effective advocate for defendant. According to defendant, because of his bias against defendant, defense counsel entirely failed to subject the prosecutor's case to meaningful adversarial testing. The record does not support defendant's contention that counsel exhibited a prejudicial or hostile attitude towards homosexuals during voir dire. Defense counsel's "creepy" and "yuck" references were made about the idea of gay men preying on children, and not about homosexuality in general, as defendant suggests. "Creepy" and "yuck" accurately describe the concept of any adult preying on a child for sexual gratification. Moreover, we reject the argument that defense counsel mangled his effort to distinguish homosexuality from pedophilia. We cannot find fault with the trial court's finding that defense counsel's statements during voir dire regarding homosexuality and pedophilia were made to elicit information from prospective jurors to assess their ability to make impartial decisions in a case that involved controversial and sensitive issues. This is the function of voir dire. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). Defendant's argument that defense counsel's comments during voir dire constituted an abandonment of his duty of loyalty to defendant is without merit. Defense counsel was not deficient on this basis. *Strickland*, 466 US at 687-688.

Defendant also asserts that counsel was ineffective because he failed to exercise peremptory challenges to excuse two jurors who expressed bias against homosexuals. The right to a jury trial guarantees an accused a fair trial by a panel of impartial, indifferent jurors. *People v Jendrzejewski*, 455 Mich 495, 501; 566 NW2d 530 (1997). A juror is impartial if the juror can lay aside any impressions or opinions and render a verdict based on the evidence presented in court. *Id.* at 517. The first juror clearly stated that she believed homosexuality is wrong, but she also stated that she would not assume that defendant was guilty simply because of his homosexuality. The second juror expressly stated that he was a Christian and did not believe in homosexuality, but that he could set aside his religious beliefs and would work hard to reach a fair and impartial decision. Thus, both jurors made statements indicating that they could set aside their opinions on homosexuality and render a verdict based on the evidence. *Id.*

Moreover, decisions relating to the selection of jurors are usually matters of trial strategy, which we generally decline to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Thus, we have been reluctant to find that a defendant has been denied the effective assistance of counsel on the basis of an attorney's failure to challenge a juror. *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). At the *Ginther* hearing, defense counsel explained that his decision not to excuse the jurors was based on trial strategy. Regarding the first juror, defense counsel stated that he did not excuse the juror because he had taken an advanced law school course that taught a theory that rather than excuse

a potential juror, counsel could "try a different approach of convincing and maybe separating them out for other purposes." In addition, defense counsel stated that he did not excuse this particular juror because the juror "gave a comforting look" when defense counsel and defendant looked at each other. Regarding the second juror, defense counsel stated that he did not excuse him because he was trying to educate the jury about homosexuality and the need for jurors to separate their prejudices to render a fair and impartial decision.

While we do not agree with defense counsel's strategy in this regard, in light of defense counsel's explanations regarding his decision not to exclude the two jurors, we follow the general rule of declining to evaluate with hindsight trial counsel's decision regarding whether to excuse a juror because such a decision is a matter of trial strategy. Moreover, because neither juror's statements during voir dire indicated an inability to set aside their personal opinions regarding homosexuality and reach a decision on a fair and impartial basis, defense counsel's failure to exclude them would not have altered the result of the proceedings. Defense counsel did not render ineffective assistance of counsel in failing to exclude the two jurors.

Defendant also claims that counsel was ineffective for not objecting to Dr. Stephen Guertin's testimony regarding the victim's shaved pubic hair. We agree that counsel was deficient for failing to object to Guertin's irrelevant testimony that the fact that the victim's pubic hair was shaved could indicate "that the child is either homosexual or is being, is becoming homosexual in the sense of is turning that way . . . ." However, we find defendant has not demonstrated prejudice to establish ineffective assistance of counsel under *Strickland*. *Strickland*, 466 US at 694. The specific points that defendant argues Guertin established with his testimony were previously established during the victim's testimony. Furthermore, in light of the victim's testimony, it is unlikely that the jury inferred from Guertin's testimony that defendant turned the victim into a homosexual. Finally, even if Guertin had not testified regarding the victim's shaved pubic hair, there was still substantial evidence establishing that defendant committed the crimes charged.

Next, defendant argues that the trial court abused its discretion in precluding him from refreshing the victim's recollection with texts or e-mails that the victim sent to defendant and that described his father's abuse of him. According to defendant, the trial court's error deprived him of his constitutional right to present a defense, and defense counsel was ineffective for failing to pursue the matter.

We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The abuse of discretion standard recognizes "'that there will be circumstances in which . . . there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). We apply a de novo standard of review when we review preliminary questions of law regarding the admission of evidence. *Lukity*, 460 Mich at 488.

We review defendant's unpreserved constitutional claim for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We find that the trial court incorrectly ruled that defense counsel could not refresh the victim's recollection. The victim testified that he could not remember whether he blockaded his room door because of his father and whether his mother broke her finger by trying to keep his father away from him. Under MRE 612, defense counsel could properly use the victim's texts or e-mails to refresh the victim's recollection. MRE 612; *People v Favors*, 121 Mich App 98, 109; 328 NW2d 585 (1982). Nonetheless, we find that this evidentiary error was harmless. A preserved nonconstitutional error requires reversal only where it is more probable than not that the error affected the outcome of the trial. *Lukity*, 460 Mich at 495-496. In this case, the victim had already testified that he told defendant that he was afraid of his father. Thus, the critical fact that defendant was attempting to elicit from the victim—that the victim was afraid of his father—had already been established to support defendant's theory that the victim complied with his father's instruction to fabricate the allegation of sexual assault out of fear of his father. Moreover, there was substantial evidence in this case establishing that defendant committed the crimes charged. The victim gave very detailed testimony regarding the sexual assaults. Furthermore, the victim's family provided additional testimony regarding the circumstances surrounding the one year period of sexual misconduct, including defendant's physical interactions with the victim. Accordingly, defendant has not established that it is more probable than not that the error affected the outcome of trial. *Id.*

With respect to defendant's claim that the error deprived him of his constitutional right to present a defense, we conclude that defendant has not demonstrated that the court's error affected his substantial rights. The jury was well aware of defendant's fabrication defense. As previously discussed, the victim testified that he was afraid of his father. And, defendant testified that the victim's father was angry with defendant and attempted to hit him. Moreover, there was substantial evidence in this case establishing that defendant committed the crimes charged. Accordingly, defendant has not demonstrated that the court's error affected the outcome of his trial. *Carines*, 460 Mich at 763-764. For this reason, we also reject defendant's ineffective assistance claim; defendant has not established that he was prejudiced by defense counsel's failure to pursue the matter of refreshing the victim's recollection with his own texts or e-mails. *Strickland*, 466 US at 687.

Defendant's final argument is that the prosecutor committed several acts of misconduct. Defendant first contends that the prosecutor improperly made a civic duty argument during her rebuttal closing argument. We review this preserved issue de novo to determine whether defendant was denied a fair trial but review defendant's remaining unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). Prosecutors may not ask jurors to convict a defendant by making civic duty arguments, which appeal to the fears and prejudices of the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, the prosecutor did not make such an argument in this case. The prosecutor merely argued that the jury should not acquit a defendant accused of sexually assaulting a child simply because the child was the only person to testify about the details of the sexual assault; the prosecutor emphasized that children in such cases are often the only people who can testify to such details. Moreover, the prosecutor told the jury that defendant should be convicted based on the evidence.

Defendant also contends that the prosecutor inappropriately vouched for the victim's credibility and that counsel was ineffective for not objecting to this alleged misconduct. The

prosecutor did not imply that she had special knowledge of the victim's veracity. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Rather, the prosecutor's argument was based on the facts presented at trial and the victim's demeanor on the witness stand. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). And, the prosecutor's statement that the victim had no reason to testify dishonestly was not improper. *Thomas*, 260 Mich App at 455. There was no plain error. Additionally, counsel was not ineffective for failing to make a meritless objection. *People v Wilson*, 252 Mich App 390, 393-394; 652 NW2d 488 (2002).

Finally, defendant argues that the prosecutor improperly distorted testimony during her closing argument and that counsel was ineffective for not objecting to the distortion. Generally, "[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence . . . ." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). We find that the prosecutor did not distort Nurse Leann Holland's testimony. The prosecutor accurately stated that Holland opined that shaved genitalia are not a normal finding in a 12-year-old child. The prosecutor, however, mischaracterized Guertin's testimony that the victim was "turning" homosexual when she argued that Guertin stated the victim was being "converted" to a homosexual. However, defendant has not demonstrated that this plain error affected the outcome of his trial. *Carines*, 460 Mich at 763. Furthermore, defendant has not established that he was prejudiced by defense counsel's failure to object; thus, he has not demonstrated ineffective assistance of counsel on this basis. *Strickland*, 466 US at 687. The victim testified that it felt normal for him to kiss a man before he met defendant. In light of this testimony, it is unlikely that the jury improperly stigmatized defendant by concluding that defendant "converted" the victim into a homosexual. Finally, even if the prosecutor had not misstated Guertin's testimony, there was still substantial evidence establishing that defendant committed the crimes charged.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering